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In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

BARRY ELTON BLACK, RICHARD J. ELLIOTT, AND JONATHAN O'MARA,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF OF AMICUS CURIAE COUNCIL OF CONSERVATIVE CITIZENS FILED IN SUPPORT OF RESPONDENTS

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I. STATEMENT OF INTEREST OF AMICUS CURIAE.[1]

The Council of Conservative Citizens is interested in this case because it ardently supports the right of freedom of expression of all of the citizens of the United States and of all persons who lawfully reside or sojourn within the boundaries of this nation. The particular emphasis of the Council is the protection of the expressive rights of the millions of Americans of British and European descent who hold to conservative views on matters of racial and ethnic relations. For this reason it submits this brief in support of the position of the Respondents Barry Elton Black, Richard J. Elliot and Jonathan O'Mara.

II. SUMMARY OF ARGUMENT.

While the burning cross has undoubtedly been utilized in the perpetration of criminal acts, it also has significance as a means of communication of political thoughts and sentiments. Because it is a symbolic expression of political speech, government cannot criminalize cross burning on account of the fact that various persons and groups who may have the occasion to view such conduct may become angry or fearful.

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[1] Pursuant to Rule 37(6) of the Court, no party to this action has written any portion of this brief. The Council of Conservative Citizens is the group solely responsible financially for the preparation of the document and not any party to this action. Sam G. Dickson, a member of the Council's Board of Directors, is the financial contributor to the process of preparing and submitting this brief.

The statute at issue, Va. Code § 18.2-423, is overbroad for the reason that it punishes someone who lights a cross solely with the intent of intimidating a person or persons. It is expansive because the term "intimidation" can simply connote symbolic expression which causes certain persons and groups to feel a sense of fear and anger merely on account of having viewed such a spectacle. Furthermore, it purports to punish someone who burns a cross on the basis that the defendant intended to intimidate another person or persons without requiring proof that such conduct did in fact intimidate someone.

Finally, the statute allows the trier of fact in any prosecution under this enactment to infer an intent to intimidate merely from the fact of burning a cross. For that reason it empowers the Commonwealth of Virginia to arrest and prosecute anyone who burns a cross in any circumstances regardless of the context in which such conduct took place.

The overbroad nature of this statute required it to be struck down regardless of the conduct of the Respondents because of the danger that this law poses to the exercise of First Amendments rights.

The Court must affirm the decision of the Supreme Court of Virginia if the Court is to continue to adhere to the "incitement to imminent lawless action" test for determining the legality of speech, particularly political speech, explicated in ***Brandenburg v. Ohio*, 395 U.S. 444 (1969)** and most recently reiterated and reaffirmed in ***Ashcroft v. Free Speech Coalition*, 535 U.S. ___, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002)**.

The burning of a cross cannot be punished as so-called "hate speech" because of what many persons believe to be

the tendency of such expression to either cause or facilitate the commission of violent and terroristic acts against racial and religious minorities and other vulnerable groups. Speech and expression cannot be prohibited on the grounds that it may encourage violent conduct at some indefinite and undetermined future time. This precept must be as applicable to the putative consequences of provocative and unpopular political speech and expression as it is to the alleged deleterious social effects of depictions and portrayals of explicit sexual conduct, even those simulating such conduct on the part of minors.

III. ARGUMENT.

Despite the disdain and the revulsion that most people feel for such a sight, the burning cross is an expression of political thought and sentiment – typically the doctrine of white separatism. It is for that reason a mode of expression protected in its most elemental form by the First Amendment. "The First Amendment does not guarantee that other concepts virtually sacred to our nation as a whole – such as the principle that discrimination on the basis of race is odious and destructive – will not go unquestioned in the marketplace of ideas." ***Texas v. Johnson*, 491 U.S. 397, 418 (1989)**.

When the Virginia statute in question is examined, the overbroad and inexact nature of this enactment becomes self-evident. It declares that "It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, or highway or other public place." Va. Code § 18.2-423. The statute does not further define what manner of conduct, other than the

burning of the cross itself, shall constitute the act of "intimidating". Nor have the Virginia courts adopted a narrowing construction of this term which explicitly states the proposition that the expression of political opinions is not embraced within the concept of intimidation insofar as the interpretation of this statute is concerned.

The lighting of a cross in an area where it is plainly visible to large numbers of minority group members is surely in one sense "intimidating". The person or persons who have undertaken such a mode of expression are thereby stating in the most unequivocal means possible their unyielding opposition to what they believe is a minority-liberal program of affirmative action in education and employment, "set asides" in the granting of government contracts, less restrictive immigration laws and other forms of government-sponsored empowerment of non-white ethnic and racial groups. A large number of non-whites – in all probability a decided majority of them – who view such a demonstration would for that reason be likely to feel a sense of fear and anger upon observing it and consequently they would undoubtedly describe themselves as having been "intimidated" because the cross burning transpired within their range of perception.

The principle of First Amendment jurisprudence is nevertheless axiomatic that speech and equivalent forms of expression can be neither prohibited nor punished because those persons who hear it or see it may be offended or otherwise detrimentally effected emotionally by it. ***Texas v. Johnson*, supra at 407-410 (1989); *Boos v. Barry*, 485 U.S. 312 (1988).** Consequently, the fact that a manner of speech or expression may have a tendency to coerce or intimidate some listeners is not a basis for holding that it falls outside the ambit of First Amendment

protection. In ***Thornhill v. Alabama*, 310 U.S. 88 (1940)** this Court held that peaceful picketing was entitled to constitutional protection even though the purpose of the picketing was to advise customers and prospective customers of an adversarial relationship existing between the employer and its employees and to thereby induce such customers not to patronize the employer. The constitutional protection afforded to such ostensibly coercive and intimidating speech was reaffirmed in ***N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 908-910 (1982)** when this Court held that the N.A.A.C.P.'s publication of the names of Black people who violated that organization's boycott of Port Gibson, Mississippi merchants could not subject that group to a successful civil lawsuit. The Court so ruled despite the fact that there was no doubt that this particular speech had had a substantial intimidating effect on those Blacks who did not desire to adhere to the N.A.A.C.P. strategy in the Port Gibson controversy.

The proscription contained in Va. Code § 18.2-423 must therefore be said to sweep within its circumference a great deal of conduct that would otherwise be fully protected expression. The statute in its entirety for that reason must be held to be overbroad and therefore unconstitutional. ***Broadrick v. Oklahoma*, 413 U.S. 601 (1973).**

This conclusion is buttressed by consideration of the second paragraph of the statute which states that "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." In Virginia "prima facie evidence" means evidence sufficient to raise a presumption of fact or establish the fact in question unless rebutted. ***Nicely v. Commonwealth*, 25 Va. App. 579, 490 S. E. 2d 281, 282 (1997).**

Allowing the state to establish a prima facie case against a defendant charged with a violation of the statute, sufficient to get the case to a jury, merely on the basis of that person's conduct in burning a cross in a public place or on the property of another without the introduction of any actual evidence of his or her intent in doing so directly contravenes this Court's holding in ***Watts v. United States*, 394 U. S. 705 (1969).** While at a political gathering assembled to protest the Vietnam War the defendant Watts said that "If they (referring to the United States Army) ever make me carry a rifle the first man I want to get in my sights is L.B.J. (speaking of then President Lyndon Johnson)". **394 U.S. at 706.** On the basis of that statement Watts was prosecuted and convicted of violating **18 U.S.C. § 871(a)**, the federal law that makes it a crime for any person to threaten the life of the President of the United States.

In reviewing Mr. Watts' conviction this Court upheld the constitutionality of **18 U.S.C. § 871(a)** but it further ruled that Mr. Watts could not be prosecuted for that crime in the circumstances in which he made the offending utterance.

> **... the statute initially requires the Government to prove a true threat. We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term. For we must interpret the language Congress chose "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and**

> **public officials." *New York Times Company v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 721, 11 L. Ed. 2d 686 (1964). The language of the political arena, like the language used in labor disputes, see *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 58, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966) is often vituperative, abusive, and inexact. We agree with petitioner that his only offense here was "a kind of very crude offensive method of stating a political opposition to the President." Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.**

394 U.S. 708.

In contrast, the Virginia statute would allow law enforcement authorities to arrest anyone charged with burning a cross in a public area, which could include such a defendant's own property. Such an unfortunate person could further be indicted and tried on such meager evidence. And according to this statutory scheme, the felonious intent can be implied from the singular act of the defendant in burning the cross.

Thus under the terms of this statute a defendant can be arrested, indicted and tried solely for lighting a cross regardless of the circumstances and context within which this expressive conduct took place. The mere possibility that a person could even be threatened with prosecution pursuant to this seriously flawed enactment mandated that it be struck down. Such judicial action was required notwithstanding the fact that not a few persons charged with violating the statute had, in fact, been engaged in

morally culpable conduct. For that reason alone the Virginia Supreme Court was amply justified in declaring this statute unconstitutional, particularly in light of its all-encompassing presumption of intent to intimidate arising merely from the exercise of this form of symbolic expression.

> **A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. See, e.g., *Smith v. People of the State of California*, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205. When the statutes also have an overbroad sweep, as here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that the defense of a criminal prosecution will generally assure ample vindication of con- stitutional rights is unfounded in such cases.**
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> * * *
>
> **... we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of the First Amendment rights may derive from the fact of prosecution, unaffected by the prospects of its success or failure.**

***Dombrowski v. Pfister*, 380 U.S. 479, 486, 487 (1965).**

Despite the palpable unconstitutionality of this statute, the Council does not dispute the proposition that Virginia or any other jurisdiction in the United States may properly pass an act which makes it illegal for anyone to

burn a cross on the property of another without that person's permission or to do so in close proximity to another person's home with the further intention of intimidating or terrorizing that person. The Council concedes the validity of such legislation because of its high regard for property rights and on account of the obvious duty of government to protect the tranquility and the sanctity of the homes of all of its citizens. See ***Frisby v. Schultz*, 487 U.S. 474 (1988)** (government can prohibit continuous picketing in front of a person's home).

In its decision striking down a statute of the state of Texas prohibiting the burning of the flag of the United States, the Court held that it was impelled to do so because a contrary opinion would effectively overrule much of its modern jurisprudence delineating the scope and protection of the First Amendment, particularly that concerning political speech and expression.

> **Thus, we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression "is directed to inciting or producing imminent lawless action and is likely to incite such action." *Brandenburg v. Ohio*, 395 U. S. 444, 447, 89 S. Ct. 1827, 1829, 23 L. Ed. 2d. 430 (1969) (reviewing circumstances surrounding rally and speeches by Ku Klux Klan). To accept Texas' argument that it need only demonstrate "the potential for a breach of the peace", Brief for Petitioner 37, and that every flag burning necessarily**

possesses that potential would be to eviscerate our holding in *Brandenburg*. This we decline to do.

***Texas v. Johnson*, supra at 409 (1989).**

Any careful weighing of the arguments both for and against the constitutionally of this Virginia statute must inexorably lead to the conclusion that this Court cannot reverse the decision of the Supreme Court of Virginia and still adhere to the Brandenburg formula, as upheld and reaffirmed in ***Texas v. Johnson.*** Intellectual integrity and the institutional necessity of maintaining a coherent body of First Amendment jurisprudence demands affirmance of the opinion of the lower court for that reason alone.

The Council anticipates that the most powerful arguments in support of the position of the petitioner in urging reversal will be the emotive ones. If they are not expressly set forth by the Commonwealth and the various amici who have submitted briefs in support of its position, they will certainly be a discernible undercurrent which will run through virtually all of the arguments advanced by that side of this controversy. The essence of that argument is this:

> **In an increasingly diverse and pluralistic America we can neither tolerate nor indulge the kind of hate-laden rhetoric and expression represented by the burning of a cross and by the open display of other such symbols. The corrosive and destructive ideas represented by these symbols do have palpable, real-life consequences. These consequences are the perpetration of hate crimes such as took place in Jasper, Texas several years ago – the James Byrd truck dragging case – and more generally the oppression and persecution of racial and ethnic minorities and other vulnerable groups such as gay people. Indeed, the most traumatic and horrific event of modern times – the Holocaust – was the end result of allowing in the name of "free speech" such pernicious discourse to permeate the infected societies out of which that terrible event arose.**

The Council will not respond to this argument because this Court, speaking through Justice Kennedy, has already done so in terms that are directly applicable to this case and which should clearly dictate its outcome. In ***Ashcroft v. Free Speech Coalition*, 535 U.S. ___, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002)**, the Court grappled with the constitutionality of certain provisions of the Child Pornography Prevention Act of 1996, 18 U.S.C. § 2251 et seq., which, among other things, in § 2256(8)(B) banned any visual depiction that "is, or appears to be, of a minor engaged in sexually explicit conduct". The target of that provision is what has come to be known as "virtual child pornography" – images that appear to depict minors which are produced by means other than the use of real children, as, for example, the production of computer-generated images and images of adults that have been electronically altered to appear to be minors.

One of the most powerful and forcefully advanced arguments of the proponents of the constitutionality of this provision, among whom were numbered the United States government speaking through its Solicitor General, was that such images had to be placed beyond the pale of First Amendment protection because the widespread dissemination of such materials to persons who have

sexual inclinations and attractions toward children would invariably encourage them to act on those impulses and to consequently molest and victimize children as a means of satiating their desires. The proponents of censorship in this very sensitive area of human sexuality understandably and plausibly argued that the fantasies of such persons would necessarily be fed by the widespread proliferation of such depictions if they were not criminalized and suppressed.

In speaking for the majority of this Court which held this and similar provisions of the act to be unconstitutional as violative of the First Amendment, Justice Kennedy expressly and emphatically rejected this "future harm" argument.

> **The Government submits further that virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct. This rationale cannot sustain the provision in question. The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts. *Stanley v. Georgia*, 394 U. S. 557, 566, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969). First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.**

> **To preserve these freedoms, and to protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct. See *Kingsley International Pictures Corp.*, 360 U. S., at 689, 79 S. Ct. 1362; see also *Bartnicki v. Vopper*, 532 U. S. 514, 529, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it."). The government may not prohibit speech because it increases the chance an unlawful act will be committed "at some indefinite future time". *Hess v. Indiana*, 414 U. S. 105, 108, 94 S. Ct. 326, 38 L. Ed. 2d 303 (1973) (per curiam). The government may suppress speech for advocating the use of force or a violation of law only if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action". *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (per curiam). There is here no attempt, incitement, solicitation or conspiracy. The government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.**

122 S. Ct. 1403.

The necessity of maintaining a coherent corpus of First Amendment law dictates that this Court cannot have varying standards for determining whether or not so-called hate speech can be banned because of its putatively harmful effects on society in contradistinction to those utilized in deciding whether or not sexually explicit materials can be proscribed because of their possible use in victimizing children. Elementary fairness dictates that all of the purveyors of speech and expression which is widely believed to be socially harmful in some respects must be "fed out of the same spoon" insofar as the judicial determination of the purview and contours of First Amendment protection of their views is concerned.

IV. CONCLUSION.

Clearly, the Supreme Court of Virginia made the correct decision in holding Va. Code § 18.2-423 to be unconstitutional and therefore unenforceable. A contrary decision would have been wholly inconsistent with the entire body of this Court's First Amendment jurisprudence as explicated up to April 16, 2002 when ***Ashcroft v. Free Speech Coalition*** was handed down. The decision of the Supreme Court of Virginia in ***Black v. Commonwealth*, 262 Va. 764, 553 S. E. 2d 738 (2001)** should therefore be affirmed by this Court.

This 9th day of September 2002.

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